Supreme Court, U.S.
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09-1240

IN THE

Supreme Court of the United States

DOUGLAS ASPHALT COMPANY, JOEL SPIVEY and KYLE SPIVEY,

Petitioners,

—v.—

ARCH INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals erred in concluding that the District Court did not commit clear error in finding, as a matter of fact, that Respondent acted in good faith in exercising its discretion under the terms of an indemnity agreement.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, the Court is advised that Arch Capital Group Ltd., a public company, is the ultimate parent of Arch Insurance Company and that there are no other publicly held corporations that own 10% or more of Arch Insurance Company's stock.

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Respondent Arch Insurance Company ("Arch") respectfully submits that a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit should not issue because no issue worthy of the exercise of this Court's certiorari jurisdiction is presented and because the decision below is in all respects correct.

OPINIONS BELOW

The opinion of the Court of Appeals is not officially reported and is reproduced in the Appendix to the Petition at A-2 - A-6. The District Court's Findings of Fact and Conclusions of Law are not officially reported and are reproduced at A-12 - A-29.

JURISDICTION

The decision of the Court of Appeals, affirming the District Court's judgment, was issued on January 15, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

There are no constitutional or statutory provisions involved.

STATEMENT OF THE CASE

Factual Background

This contract dispute arises out of an indemnity agreement that the parties entered into in 2003. (A-13) Under the terms of the agreement, Douglas Asphalt Company ("Douglas") and Joel and Kyle Spivey

(collectively "Petitioners") agreed to indemnify Arch for any loss Arch might incur as a result of having issued bonds for Douglas. (A-13-14) The indemnity agreement further provided that in the event Douglas was in default on any construction contract bonded by Arch, Douglas assigned all of its rights under all bonded contracts, including the rights to balances due, to Arch. (A-14) In the event of a default, Arch had the right, but not the obligation, to take over work on all bonded projects from Douglas. (*Id.*) If Arch set up a reserve to cover any actual or potential loss, it was entitled to the deposit of collateral from Douglas as security for indemnification. (A-15)

The indemnity agreement gave Arch the exclusive right to determine which claims against its bonds would be defended, settled or paid and its decisions were binding on Douglas and the Spiveys. (A-14-15) If any one of them wanted Arch to defend against a demand or claim, the indemnity agreement required that they deposit with Arch, at the time of the request, cash or collateral satisfactory to Arch to be used to pay any judgment that might be rendered. (A-15) Under well-established (and undisputed) principles of Georgia common law, Arch was entitled to indemnification unless Petitioners could prove that Arch acted in bad faith in satisfying claims under the bonds. (A-26)

At Douglas's request, Arch issued performance and payment bonds for Douglas on 200 construction projects between 2003 and 2006. (A-15) Many of the projects were for the Georgia Department of Transportation ("GDOT").

In 2006, the GDOT declared Douglas in default on three of its largest projects. (A-16) Douglas and Arch executed an agreement establishing a joint account into which contract funds from the three defaulted projects would be deposited and out of which expenses for subcontractors and suppliers would be paid. (A-16-17) Payments for expenses substantially exceeded balances received under the contracts. (A-21) Initially Arch allowed Douglas to continue work on all bonded projects, but it also engaged the services of an outside consultant to investigate Douglas's financial condition and the status of construction on the bonded projects. (A-18-19) Beginning in 2007, Douglas was defaulted on a number of additional projects. (A-19-20) Arch established a reserve of $40,000,000 and demanded the same amount in collateral from Douglas pursuant to the terms of the indemnity agreement. (A-20) No collateral was ever posted. (*Id.*)

Arch ultimately concluded that Douglas was not capable of completing the remaining work and took control of all Arch-bonded projects, soliciting competitive bids for completion of the work. (A-22-24) The costs Arch incurred in completing the projects and paying debts due to Douglas's subcontractors were greater than the contract balances Arch recovered, even after Arch obtained significant concessions from GDOT which reduced Petitioners' debt to Arch by more than $20 million. (A24-25) Arch's losses on the performance and payment bonds mounted to $88,892,128.15, and continued to accrue. (A-25)

Arch sought indemnification from the Petitioners for the losses it had incurred as well as the posting of collateral as security for the costs that continued to

accrue as the projects were completed. (A-12) Petitioners asserted that Arch had acted in bad faith and that they were therefore relieved of any obligations under the indemnity agreement. (*Id.*)

Proceedings Before the District Court

Arch instituted this diversity action before the United States District Court for the Southern District of Georgia seeking specific performance of the indemnity agreement and damages. After extensive discovery, Arch moved for summary judgment on all of its claims. The District Court denied the motion finding that there were "some, albeit few" genuine issues of material fact in dispute. 9/24/08 Order at 4 (D.E. 46). After a four-day bench trial, the District Court issued its detailed findings of fact and conclusions of law. The District Court found that Arch had acted in good faith and was therefore entitled to indemnification. The District Court made specific findings regarding the credibility of the testifying witnesses (A-24) and concluded that "[a]fter personally observing the witnesses, listening to their sworn testimony, and studying thousands of pages of payment records, the Court finds overwhelming evidence of Arch's good faith and no credible evidence of bad faith." (A-27) On July 2, 2009, the Court entered judgment for Arch in the amount of $88,892.128.15 and ordered the deposit of $40,000,000 as collateral for additional losses. (A-10-11) Petitioners timely appealed.

The Decision of the Court of Appeals

The issue presented to the Court of Appeals was whether the District Court committed clear error in determining that Arch had not acted in "bad faith."

The three fact-based arguments Petitioners presented to the Court of Appeals are the very same fact-based arguments they seek to advance here, namely that Arch exhibited bad faith by (1) completing the bonded projects at a cost higher than that for which Douglas allegedly could have completed the work; (2) failing to contest Douglas's defaults or dispute Arch's performance bond obligations; and (3) refusing to keep Douglas involved in the projects.

On January 15, 2010 the Court of Appeals issued its six page, per curiam opinion affirming the District Court's judgment. (A-2-6) The Court of Appeals addressed each of Petitioners' three arguments. First, the Court of Appeals observed that the Petitioners had presented no evidence that the costs Arch incurred were unreasonable, beyond their assertion that they could have completed the projects for less. (A-5) Second, Petitioners had not pointed to any default that they had requested Arch to defend. (*Id.*) Third, Arch had excluded Douglas from the projects only after Douglas's defaults indicated, and Arch's investigation confirmed, that Douglas was unequipped to complete the projects. (A-5-6)

REASONS FOR DENYING THE PETITION

A. This Case Presents No Issue Worthy of this Court's Review

None of the factors that warrant exercise of this Court's certiorari jurisdiction are present here. *See* Supreme Court Rule 10. The Petition itself does not suggest otherwise. The Petition points to no conflict between the Eleventh Circuit's decision and any decision of any other Court of Appeals. The Petition does not — and could not — suggest that this case raises any issue of federal law, or indeed, that any question of law is presented at all. There is no inkling that the Court of Appeals' decision conflicts with any of this Court's precedents or any decision of a state court of last resort or that it has any impact beyond the parties here. The Petition puts forth no reason warranting review by this Court.

Instead the Petition asks this Court to assume the role of fact finder and upset the considered decisions of both courts below. But it has long been this Court's settled practice that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Supreme Court Rule 10; *accord United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."); *Texas* v. *Mead*, 465 U.S. 1041, 1043 (1984) (quoting *Johnston*); *NLRB* v. *Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 176 n.8 (1981) (dismissing writ of certiorari as improvidently granted on ground that "we are presented primarily with a question of fact, which does not merit Court review"); *Southern Power Co.* v.

North Carolina Public Service Co., 263 U.S. 508, 509 (1924) (dismissing writ because parties' arguments addressing the sufficiency of evidence were "not the ground upon which we granted the petition, and, if sufficiently developed, would not have moved us thereto"); *Houston Oil Co.* v. *Goodrich*, 245 U.S. 440, 441 (1918) (dismissing writ because parties' arguments depended primarily on review of the evidence).

This Court is particularly reluctant to upset a factual finding that a court of appeals has already reviewed and affirmed. *Graver Tank & Manufacturing Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949) ("A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."); *accord Exxon Co., U.S.A.* v. *Sofec, Inc.*, 517 U.S. 830, 841 (1996) (quoting *Graver Tank & Manufacturing Co.*); *Berenyi* v. *District Director*, 385 U.S. 630, 636 (1967) (same); *NCAA* v. *Board of Regents*, 468 U.S. 85, 98 n.15 (1984) ("In accord with our usual practice, we must now accord great weight to a finding of fact which has been made by a district court and approved by a court of appeals."); *United States* v. *Doe*, 465 U.S. 605, 614 (1984) ("Traditionally, we . . . have been reluctant to disturb findings of fact in which two courts below have concurred."); *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982) ("[T]his Court has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts."); *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980) ("In view of our settled practice of accepting, absent exceptional circumstances, factual determinations in which the district court and the court of ap-

peals have concurred, we decline to review these and other findings of fact petitioner argues were clearly erroneous.").

The District Court's careful factual findings regarding Arch's good faith have already been reviewed and affirmed by the Court of Appeals and Petitioners have pointed to no exceptional circumstances warranting further review by this Court.

B. The Decision Below Was In All Respects Correct

Even setting aside that the factual issues Petitioners raise are not worthy of this Court's attention, Petitioners have pointed to no admissible evidence that undermines the District Court's findings. Instead, without the benefit of any citation to the record (*see* Petition at 5-9), the Petition advances factual arguments never presented to the courts below,[1] factual arguments directly contradicted by the stipulated facts,[2] and factual arguments unsupported by any documentary evidence or credible testimony.[3] Peti-

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1 *See, e.g.*, Petition at 2 (claiming, falsely, that the record reflects that GDOT performed unscientific and unreliable tests to "discredit and destroy" Douglas).

2 *See, e.g.*, Petition at 3 (claiming, falsely, and despite its own stipulation to the contrary, that Arch required Douglas to declare itself in default on Arch-bonded projects).

3 *See, e.g.*, Petition at 5 (claiming, falsely, that Petitioners proved they could have completed the projects more cheaply); *id.* at 7-8 (claiming, falsely, that Arch failed to

Footnote continued on next page.

tioners' unsupported and insupportable assertions do not even begin to call into question the District Court's factual findings, much less demonstrate its clear error or undermine the correctness of the decision of the Court of Appeals.

CONCLUSION

The Petition for a writ of certiorari should be denied.

Dated: May 10, 2010
New York, New York

Respectfully submitted,

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pursue valid claims against GDOT)